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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SORIN PALAGHIUC, Defendant and Appellant.	C043780 (Super. Ct. No. 01F00623)

In this case, police officers questioned defendant about a homicide. The officers implied they might arrest a good friend of the defendant for the crime. Defendant confessed. Thereafter, defendant moved to suppress the confession on the ground, inter alia, that it was involuntary because it was induced by threats to arrest defendant's good friend. The trial court denied suppression of the confession and defendant challenges that ruling on appeal.

PLEASE SEE ATTACHED CONCURRING OPINION

We shall affirm the trial court's ruling. Cases that have held confessions involuntary, on the ground they were induced by threats to persons other than defendant, have all involved threats to close family members of the defendant. In the circumstances of this case, we decline to extend that rule to threats made to defendant's good friend.

Defendant Sorin Palaghiuc was convicted of first degree murder (Pen. Code, § 187[1]) with personal use of deadly and dangerous weapons (beer bottle and hammer) (§ 12022, subd. (b)(1)) while engaged in robbery and burglary (§ 190.2, subd. (a)(17)), plus additional counts of robbery (§ 211), burglary (§ 459), and grand theft (§ 487, subd. (d)(2)). He appeals, challenging the trial court's refusal to exclude incriminating statements he made to law enforcement officers.[2] Defendant contends his waiver of rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) [16 L.Ed.2d 694] was not voluntary, and some statements were obtained in violation of his Sixth Amendment right to counsel. We shall affirm the judgment.

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[1] Undesignated statutory references are to the Penal Code.

[2] Defendant moved to exclude the statements in a motion in limine asking the court to "suppress" the statements. The parties and the trial court inaccurately referred to defendant's motion in limine as a motion to suppress. Defendant is entitled to review of the trial court's refusal to exclude evidence of his confessions. (*People v. Haydel* (1974) 12 Cal.3d 190, 197 [involuntary admissions are inadmissible].)

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged in Count one with first degree murder (§ 187) of Ricky McAuliffe on January 7, 2001, with personal use of a deadly and dangerous weapon--beer bottle and hammer-- (§ 12022, subd. (b)(1)), with special circumstances that the murder was committed while engaged in the commission of robbery and burglary (§ 190.2, subd. (a)(17)). Counts two and three alleged the robbery (§ 211) and burglary (§ 459) of McAuliffe in his dwelling. Count four alleged a different burglary of a detached garage between June 1, 1999, and October 7, 1999. Count five alleged burglary of an inhabited dwelling on October 26, 2000. Count six alleged burglary of an inhabited dwelling on November 12, 2000. Count seven alleged burglary of an inhabited dwelling on November 28, 2000. Count eight alleged burglary of an inhabited dwelling on January 14, 2001. Count nine alleged theft of a shotgun (§ 487, subd. (d)) on January 14, 2001. Count ten alleged burglary of an inhabited dwelling on January 10, 2001. Count eleven alleged attempted burglary of an inhabited dwelling on January 18, 2001. Count twelve alleged burglary of a detached garage on January 18, 2001.

This appeal involves victim Ricky McAuliffe, who was found dead on January 7, 2001, of blunt force trauma in a living area within his place of business (a body shop). A broken beer bottle was found at the scene.

Homicide detectives learned defendant told his friends he committed the crime. The detectives arranged to wiretap a conversation between defendant and his friends George and John

Whittington[3] (which was played for the jury). During the wiretapped conversation on January 17, 2001, defendant said he went to the victim's place because the victim owed him money, and if the victim did not pay, defendant would "just bash his fucking head in." The victim "made the mistake" of insulting defendant and reaching for a knife or hammer. Defendant "had to teach him a lesson." Defendant hit and stabbed the victim with a 40-ounce beer bottle he had brought from home, which had been left at his home by George. Defendant then hit the victim with a hammer that was at the scene. Defendant said he "just exploded." Defendant described the blood and gore and said he felt like a huge weight had been lifted from his shoulders, and it was the "best high in the world."

The jury was also presented with several audiotaped/videotaped interviews (described *post*) between defendant and homicide detectives, in which defendant admitted the killing and admitted he went to the victim's place not to collect a debt but with the intent to rob and kill him.

Defendant did not testify at trial. In closing argument to the jury, defense counsel did not dispute that defendant caused McAuliffe's death but argued the prosecution had not proved its case beyond a reasonable doubt, and the various confessions contradicted each other as to whether defendant went to McAuliffe's place to collect a debt or to rob or to kill.

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[3] For ease of reference, we hereafter refer to the brothers by first name.

Counsel suggested defendant had inflated his culpability in a desire to be punished for having caused the victim's death.

On February 28, 2003, the jury returned verdicts finding defendant guilty as charged on all counts, and finding true the special circumstances and weapon use.

The trial court sentenced defendant to 11 years, eight months in prison, plus a life sentence without the possibility of parole. This appeal followed.

DISCUSSION

I. *Standard of Review*

In reviewing the trial court's determination of voluntariness of custodial statements, we apply an independent standard of review, doing so in light of the record in its entirety, including all the surrounding circumstances--both the characteristics of the accused and the details of the encounter. (*People v. Neal* (2003) 31 Cal.4th 63, 80 (*Neal*).) "'[W]e accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we "'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence."'" (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) The voluntariness of the waiver and confession must be established by a preponderance of the evidence. (*Ibid.*)

II. *Custodial Statements Were Properly Admitted*

Defendant contends his statements were inadmissible because (1) his waiver of *Miranda, supra,* 384 U.S. 436, rights was involuntarily coerced by the law enforcement officers' false threat to arrest defendant's innocent friend George for the killing of McAuliffe; and (2) the detectives violated his right to counsel because they were aware he had ongoing mental problems that would undermine his exercise of free will to waive his right to have counsel present during the interviews in which he incriminated himself. We disagree.

A. *Background*

In a motion in limine, defendant sought exclusion of statements he made to law enforcement officers on January 18 and January 22, 2001, and "all fruit derived therefrom."

The trial court conducted a hearing, with testimony from the detectives who interviewed defendant and defendant's former public defender, and transcripts of the following contacts between defendant and law enforcement, which defendant challenges in this appeal:

1. *January 18, 2001*

On January 18, 2001, defendant (age 20) was arrested for an unrelated burglary and invoked his right to remain silent. While in custody on the burglary charge, he was interviewed on videotape by detectives investigating the McAuliffe homicide. They asked some preliminary questions (e.g., birth date, address, phone number) and asked whether he was related to someone (his uncle) who had the same address as defendant and had been interviewed concerning a homicide near the uncle's body

shop near 30th and Q Streets in Rio Linda. The detectives told defendant they were investigating that case. They read him his *Miranda* rights. He said he understood. They asked if he was willing to talk. He asked, "about what?" They said, "about the case" and began asking questions, which defendant answered. Defendant initially denied knowing the victim. When asked if he knew George Whittington, defendant said George was a good friend who owned a thrift store and helped Women Escaping A Violent Environment. When asked if he thought George could be involved in the killing, defendant said, "Hell, no. No way."[4] He said George was a "good guy" who helped those less fortunate by giving them clothes and money. Defendant asked if George was a suspect. The detective responded, "Well, we're trying to figure this out. Would there be any legitimate reason why his DNA or fingerprints would be there at the scene?" Defendant said, "I don't know." The detective asked, "if we arrested George for this murder, would it surprise you at all?" Defendant said, "Hell, yeah." The detective asked, "if we were going to arrest George for this, okay--we wouldn't want to hurt him or anything--would you be willing to help us get him at a safe location so we could arrest him without any difficulty?" Defendant replied, "No way, man. [¶] . . . [¶] It's just . . . [¶] . . . not the kind of guy I am. No."

The interview continued as follows:

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[4] A detective who testified at the hearing acknowledged they had no basis or plan to arrest George.

"[Defendant]: Okay. So you guys are going to arrest George on this shit or what's going on?

"DET. STOMSVIK: Well, we're trying to think of a reasonable explanation why, like I said, his DNA or fingerprints would be at the scene there, and you know--

"DET. BAYLES: You have any idea at all?

"[Defendant]: Damn.

"DET. BAYLES: What? Something tells me you got an idea.

"[Defendant]: Um, yeah.

"DET. BAYLES: Well, what's the idea? We're all ears.

"[Defendant]: Like the idea is I'm going to solve this case for you right now.

"DET. BAYLES: Okay.

"DET. STOMSVIK: Okay.

"[Defendant]: Okay?

"DET. BAYLES: We're all cool. Good. We're all ears.

"[Defendant]: And I'm going to save you guys a lot of pain and, you know, woo-woo-woo.

"DET. BAYLES: Okay.

"DET. STOMSVIK: Go ahead.

"DET. BAYLES: Solve it.

"[Defendant]: Here's what happened.

"DET. BAYLES: Okay.

"DET. STOMSVIK: Okay.

"[Defendant]: I'm going to tell--I'm going to solve this whole case for you right now.

"DET. BAYLES: Okay.

"DET. STOMSVIK: Okay.

"[Defendant]: I did it."

Defendant said George had visited defendant's home the night before the killing and left a 40-ounce bottle of beer in the garbage. On the day of the killing, "the dude [the victim] looked at me wrong," so defendant went home, drank some beer, grabbed a bottle, went to the victim's shop, which was unlocked, found the victim on a bed with his eyes closed, smashed his head with the bottle, stabbed him in the head with the bottle, reached over and grabbed a hammer, and then killed him. Defendant apologized for causing the detectives "a lot of time and trouble."

The detectives asked, "You're not just saying this to help George out, are you?" Defendant replied, "No. I'm the one who did it. I swear to God. I could tell you everything." Defendant admitted knowing the victim; defendant had on occasion greeted him on the street, but the victim did not even acknowledge defendant. Defendant said he went to "fuck his ass up" because "he stared at me wrong" and "I got drunk." Defendant said, "It's like I'm a violent person, don't like no stares and shit, you know. And just ever since I seen my dad kill himself and shit, you know, I got like problems up there, but I never went to get counseling." The detectives commended defendant for taking responsibility and giving the victim's family closure.

Defendant said he took the hammer and the victim's wallet and burned them and threw the coins and metal part of the hammer in the creek.

Defendant denied any knowledge of the victim being a drug dealer. Defendant denied owing or being owed money with respect to the victim. Defendant said he has used drugs in the past. On the night of the killing, he did not use drugs but drank 80 ounces of beer, which was not unusual for him.

Defendant gave a detailed description of the killing and the crime scene. He said he went to the victim's place not to kill him but "to fuck his ass up." He did not care whether or not he killed the victim. He was mad enough to want the victim dead, and he made sure the victim was dead before he left the scene.

The transcript also shows:

"DET. STOMSVIK: . . . You know this may send you to prison for a very long time, correct?

"[Defendant]: Oh, yeah. Oh, yeah.

"DET. STOMSVIK: Oh, yeah.

"DET. BAYLES: Uh-huh.

"DET. STOMSVIK: Do you think it might help you, you won't hurt anybody else? Are you afraid you might hurt someone else or--

"[Defendant]: Um, I think I need some mental help or something, you know. I mean, I was supposed to get it when I was like 10 and shit, you know--

"DET. STOMSVIK: Uh-huh.

"[Defendant]: --to see my dad kill himself and shit. But you know, I'm not blaming it on that, you know. It's just--

"DET. BAYLES: Uh-huh.

"[Defendant]: --something I can't control when I get mad, you know."

Defendant said he previously took Elavil but stopped and did not want to take it.

Defendant said he would take the blame to protect a friend, e.g., if George had committed the crime and defendant's DNA was on the bottle, defendant would "take the fall."

2. *February 15, 2001*

The detectives interviewed defendant on February 15, 2001, after a public defender began representing defendant.[5] Defendant said, "I don't like her [the lawyer]. I don't want her. [¶] . . . [¶] I just want to go--you know, I want to say I'm guilty." The detectives first put on the record that they "got a call from a deputy over there [at the jail] sayin' you wanted to talk to us?" Defendant said, "Yeah." Defendant said he "pushed the button" in his room but no one answered, so he wrote a note, pushed the button again and "told him [a deputy in the jail] I wanted to talk to you guys. He told me to stand by. I pushed it again. He told me to fly a kite.[6] I flew a kite, and then you guys were there." The detective said: "So you

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[5] Amy Rogers of the Public Defender's Office was apparently appointed to represent defendant when the complaint was filed on January 22, 2001. She made her first appearance in the case on February 5, 2001. (She was subsequently relieved and a different public defender represented defendant at trial.)

[6] A detective testified at the hearing that a kite is a form for inmates to write messages.

contacted us. We didn't contact you, right?" Defendant said, "Yeah."

Defendant said he had "found God." He asked to speak with the detectives because he wanted to correct some statements he made in the first interview.

The detectives again read defendant his rights and asked, "You understand, and do you want to talk?" Defendant said, "All right." Defendant said he wanted to plead guilty "[c]uz I killed him. I robbed him. I went over there knowingly and willfully." Defendant did not attack the victim because of any look the victim gave him. Defendant had heard the victim received a new supply of heroin and went to rob him. Defendant also described some bad feelings arising from a prior sale of baseball cards. Defendant said he made his living by "robb[ing]" houses. Defendant indicated other persons were involved in planning the robbery of the victim, but defendant refused to name them. Defendant said he decided before he went there that he was going to kill the victim. Defendant described other burglaries he committed.

With respect to McAuliffe, defendant said, "I killed him in cold blood to rob him, and I want to plead guilty, and this lawyer of mine she doesn't care to hear it." Defendant said he thought the lawyer's motive was "[t]he dollar figures," and "she's seeing that, you know, I seen my dad kill himself, and you know, I guess use the, oh, you're messed up in the head routine for . . . [¶] . . . [¶] . . . a long time so she could get paid."

The transcript shows towards the end of the conversation the detective commented they would have to try to figure out the identities of the accomplices and stated:

"DET. STOMSVIK: If you feel in your heart that--um--you'd like to do that, you know--um--give us a call, contact us. Um--we're kind of on some touchy legal grounds here. Okay? We're not really supposed to be contacting you.

"[Defendant]: I contacted you.

"DET. BAYLES: You did.

"DET. STOMSVIK: You can call us anytime you want, and we'll talk to you.

"[Defendant]: Let me get your guys's [*sic*] number."

"DET. STOMSVIK: Okay. I'll give you a card.

"[Defendant]: We gonna get in touch tomorrow about that [*sic*] burglaries?

"[¶] . . . [¶]

"DET. BAYLES: . . . as we are right now you want us to come and contact you again tomorrow?

"[Defendant]: Yeah."

The detectives and defendant arranged a tour for the following day for defendant to show locations of his burglaries. The detectives told defendant that if something came up and they could not make it, "call us. Okay? It's easier for you to call us than it is for us to--to go over there. See, we can't really just call and talk to you, but you can call and talk to us."

3. *February 19, 2001*

On February 19, 2001, the detectives met with defendant, who disclosed the names of his accomplices. The transcript

confirms defendant "invited you guys--I told you guys to come and get me so I could talk to you guys about some of your cases. . . . Give you some information--. . .--to help you guys."[7] The detectives again read defendant his *Miranda* rights and stated on the record that the interview was being videotaped. Defendant said that, after talking to his girlfriend and reading the Bible, he decided to disclose the names of his accomplices.

After a long interview, the detectives left the room. Defendant prayed aloud.

The detectives retrieved defendant, and they went on a drive for defendant to show them houses he had burglarized.

4. *March 15, 2001*

The final interview challenged by defendant on appeal occurred on March 15, 2001, after defense counsel expressed a doubt about defendant's competency to stand trial (which was ultimately unsuccessful).[8]

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[7] Ellipses replace the detective's interjections of "Right" and "Uh-huh."

[8] On February 23, 2001, defense counsel expressed a doubt as to defendant's competency to stand trial, pursuant to section 1368. The trial court declined to prohibit contact between defendant and law enforcement but did order that the detectives not initiate contact. The trial court appointed Doctors Nakagawa and Wilkonfield to examine defendant and ordered police not to initiate contact with defendant regarding this case. On February 27, 2001, defense counsel told Detective Stomsvik by telephone that defendant had a history of mental problems and had been "1368'd." She asked if the detective would call her the next time he received a call from defendant. The detective said he would talk to the District Attorney's office about it (which ultimately told him he did not have to comply with defense counsel's wishes). Defense counsel advised defendant not to speak with law enforcement. Defendant nevertheless

A transcript of an interview on March 15, 2001, shows:

"DET. BAYLES: Um, you called my office and told me that you needed to speak with us.

"[Defendant]: Yes.

"DET. BAYLES: [Stated location of interview] and we're only here because you requested that we come talk with you.

"[Defendant]: Yes, that's right."

The detective again advised defendant of his *Miranda* rights, and defendant confirmed he understood his rights and wanted to talk to the detectives without his attorney present. Defendant spoke about the car used to drive to McAuliffe's place. Defendant also said he found peace by confessing to the killing. Defendant again admitted killing McAuliffe and said he was going to plead guilty. His lawyer was trying to show he was crazy, to get him "off the hook," but he wanted to take responsibility.

5. *The Ruling*

On January 29, 2003, the trial court denied the motion in limine/suppression motion. The court observed defendant on videotape appeared relaxed and comfortable. The court found no deceit or coercion that would render the confession involuntary. The trial court later reconsidered the matter and reaffirmed its ruling.

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initiated another contact with detectives on March 2, 2001; he told them his friends were mad at him for disclosing the names of his accomplices, but he had to do the right thing and do "what the Lord wants." On March 16, 2001, the doctors filed their reports, and the trial court found defendant competent to stand trial.

B. *Analysis*

1. *Miranda and Voluntariness*

Defendant says that, although the transcript reflects he received and understood his *Miranda, supra,* 384 U.S. 436, rights, he did not explicitly agree to answer questions (though he went on to do so). However, a *Miranda* waiver is implied where the defendant is informed of his *Miranda* rights, indicates he understands them, and thereafter answers questions posed by interrogators. (*People v. Whitson, supra*, 17 Cal.4th 229, 250.)

Defendant argues his first confession on January 18 was involuntary because it was coerced by the detectives' threats to arrest his friend George, and defendant's subsequent statements were consequently tainted. We disagree.[9]

The due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible involuntary statements obtained from a criminal suspect by coercion by a law enforcement officer. (*Neal, supra*, 31 Cal.4th 63, 79.) A statement is involuntary when, among other circumstances it was extracted by any sort of threats or obtained by any direct or implied promises, however slight. (*Ibid*.) Voluntariness does not turn on any one fact, no matter how apparently significant,

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[9] In a throwaway paragraph at the end of his argument, defendant asserts several of his burglary convictions (unrelated to the murder) should also be reversed because he admitted the burglaries during the latter interviews with detectives. He does not show how the detectives' threat to arrest George for homicide coerced defendant to admit to unrelated burglaries. In any event, our conclusion that defendant voluntarily waived his *Miranda* rights defeats his argument about the burglaries.

but rather on the totality of the circumstances. (*Ibid.*) Evaluation mandates inquiry into all the circumstances, including evaluation of the defendant's age, experience, education, background, and intelligence. (*Id.* at p. 84.) Threats traditionally have been recognized as corrosive of voluntariness. (*Ibid.*)

Defendant argues his first confession on January 18, 2001, was the involuntary product of psychological coercion caused by the detectives' false threat to arrest his good friend George for the crime. He argues he was only 20 years old and had his first contact with law enforcement a mere week earlier (when he was questioned on an unrelated crime and invoked his right to remain silent). He also invoked his right to remain silent when he was arrested for burglary on January 18, 2001. Defendant notes the doctors who conducted the section 1368 evaluation estimated (without clinical testing) that he was in the low-to-average range of intelligence. Defendant says he did not confess until the detectives falsely said they intended to arrest George. Defendant argues the fact he invoked his right to remain silent on two prior occasions (regarding unrelated matters) constitutes proof that he would not have confessed this time had the detectives not preyed on his friendship with George by threatening to arrest George for something George did not do. Defendant concludes his January 18 confession was involuntary because it was the product of psychological coercion.[10]

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[10] Defendant's opening brief asserts the detectives falsely represented they intended to arrest George. The Attorney

However, cases cited by defendant involved police threats against the defendant himself. (E.g., *Neal, supra*, 31 Cal.4th 63, 85 [detective threatened, in a Greyhound bus metaphor, to drop the defendant off "closer to Timbuktu than to home" if he did not cooperate, and promised to make things as good as possible for the defendant if he cooperated].) Here, the detectives made no threats against defendant himself.

Other cases cited by defendant, in which threats were made against persons other than the defendant, involved threats against close family members.

Thus, *People v. Haydel, supra,* 12 Cal.3d 190, held a defendant's consent to search and subsequent statements were involuntarily coerced by psychological pressure on him to cooperate in the hope of freeing his wife and child, who had been detained. (*Id.* at pp. 200-201.) *Haydel* said, "Although

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General's brief says (without citation to the record) that the detective falsely implied George's DNA or fingerprints were found. Defendant's reply brief accepts the concession, but states, "The threat to arrest appellant's close childhood friend is the fact that caused appellant to abandon his rights and talk to the detectives about the crime, not the deceit about George's DNA or fingerprints."

Defendant appears to draw this distinction, because the People invoke the rule that "[s]o long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted by deception are admissible in evidence. [Citations.]" (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280.) Defendant, in the face of an indubitably truthful confession, hopes to rely on authority that coerced confessions, whether true or false, are barred from evidence because, among other reasons, it offends the community's sense of fair play and decency to convict a defendant by evidence extorted from him. (*People v. Cahill* (1993) 5 Cal.4th 478, 517 [trial court error in admitting defendant's involuntary confession elicited through implied promise of benefit or leniency was not reversible per se].)

'[t]he fact that a defendant believes or hopes his confession may result in the exoneration of others does not render it involuntary as a matter of law' [citations], here there were other facts such as that the detention of the wife had become illegal and the child was with her." (*Id.* at p. 201, fn. 5.)

People v. Matlock (1959) 51 Cal.2d 682 said, "A serious question is presented by the threat of an officer to 'bring the rest of the family in' which was expressly made in order to, and did, induce defendant to 'tell us where the jewelry was.' A confession coerced by a threat to arrest a near relative is not admissible. [Citations.]" (*Id.* at p. 697.)

In *People v. Shelton* (1957) 151 Cal.App.2d 587, the officers told the defendant's wife that if he did not confess they might arrest her. She then talked to the defendant, and he confessed. The appellate court concluded the confession was not voluntary (though its admission was not prejudicial). (*Id.* at p. 588.) "Coercion of a confession by threat to arrest a near relative unless the accused admits his guilt renders the confession involuntary." (*Ibid.*)

Cases added in defendant's reply brief similarly involved close family members. (*People v. Trout* (1960) 54 Cal.2d 576, 585 [police had the defendant's wife in custody and threatened or promised to make her release dependent upon the defendant's confessing to the crimes], overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509; *People v. Rand* (1962) 202 Cal.App.2d 668, 674 [detective threatened to take the defendant's wife to jail and that his children would possibly go to juvenile hall]; *People v. Mellus* (1933) 134 Cal.App. 219, 225

[threat to "lock up" the defendant's mother if he did not talk].)

Here, there was no threat to arrest a relative. Defendant merely asserts George is a very good childhood friend. He told the detectives he and George were neighbors from the time defendant was 10 until he turned 17. Defendant said he remained "good friends" with George.

At oral argument, defendant's counsel acknowledged she had been unable to find a case holding a confession was rendered involuntary by threats to arrest a defendant's friend. However, counsel argued the relationship between defendant and his friend George was "like family." However, the record does not support the argument.

The record shows that, at most, defendant characterized his relationship with George as "good friends." George's brother, John, characterized the relationship between defendant and George as "fairly close friends." George lived across the street from defendant from the time defendant was 10 years old until defendant was 17 years old. However, contrary to counsel's claim at oral argument, there is no evidence that defendant and George ever lived in the same household. These circumstances fall short of demonstrating that defendant's friendship with George was the equivalent of a close family relationship.

The essential vice that the coerced-confession rule is designed to avoid in this context is that a defendant will falsely take the rap to save a loved one from arrest and incarceration. In other words, there is a danger that an

innocent person will be convicted. On this record, we are confident that, given defendant's relationship with George, he would not have falsely confessed to murder to save George from being arrested.

We therefore reject defendant's argument that the insinuations of the police, that George would be arrested for the crime, rendered defendant's confession involuntary.

The totality of circumstances in this case weighs heavily in favor of voluntariness. Unlike *Neal, supra*, 31 Cal.4th 63, here there was no continued interrogation after invocation of rights. There was no deprivation of food, water, or toilet facilities. Defendant acknowledges the interview lasted only two hours. The interrogation was not heavy-handed but rather cordial. There is no indication that defendant was of insufficient intelligence to understand the rights he was waiving or the consequences of the waiver. The trial court noted defendant appeared relaxed and comfortable on the videotape. Although defendant was only 20 years old, he knew his rights and had demonstrated his ability to look out for himself by invoking his right to remain silent on the two prior occasions. That his friendship with George moved him to confess in order to protect George from a perceived threat of arrest does not render his confession a product of unlawful coercion. Moreover, defendant's own statements reflect another reason for his confession was that he hoped to get mental help for anger control. The circumstances that defendant had anger control problems and saw his father kill himself do not rise to the level of mental defect that would undermine the voluntariness of

his confession. Additionally, defendant's subsequent interviews reveal a conscience. A factor weighing in favor of voluntariness is the apparent pressure that the defendant's guilty conscience exerts upon him. (*Neal, supra*, 31 Cal.4th 63, 85.)

We conclude the totality of circumstances weighs in favor of voluntariness.

In light of our conclusion that the January 18 statement was voluntary, we need not address defendant's arguments that subsequent interviews were the product of an initial unlawful coercion on January 18.

We reject defendant's suggestion that his second confession was coerced because the detective began the interview by mentioning George and saying defendant was doing the right thing.

We also reject defendant's suggestion that subsequent interviews were conducted despite the detectives' awareness that defendant had possible psychiatric or mental problems (because he spent a night in the jail's psychiatric ward and because his lawyer expressed doubt as to his mental competence). He asserts the jail records indicate he ultimately was diagnosed as suffering from bipolar disorder, major depression and possible psychosis. However, he merely cites a 10-page span of handwritten (some illegible) notes from the jail psychiatric services. We note an entry on March 15, 2001 (the date of the last interview at issue in this appeal), states, "Unlikely that he suffers from mental illness." A later note, dated June 29, 2001, merely says, "possible" bipolar disorder and psychosis.

The trial court stated defendant did not appear to have any mental defect in the videotaped interviews, and the court noted it had found defendant competent to stand trial. Even assuming for the sake of argument the truth of defendant's assertions that illegible handwritten jailhouse notes say he had on-going mental problems and engaged in self-destructive behavior such as banging his head against his cell wall, defendant presented no evidence that any psychiatric or mental problem vitiated his ability to make a voluntary waiver of his *Miranda* rights.

We conclude defendant's custodial statements were voluntary, and their admission did not violate defendant's *Miranda* rights.

2. *Sixth Amendment Right to Counsel*

Defendant contends the statements he made between February 15 and March 30, 2001, should have been excluded because they were obtained in violation of his right to counsel. We disagree.

The Sixth Amendment to the United States Constitution states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The right to counsel attaches at the initiation of adversary judicial criminal proceedings. (*United States v. Gouveia* (1984) 467 U.S. 180, 188 [81 L.Ed.2d 146].) "As a general matter, . . . an accused who is admonished with the warnings prescribed . . . in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and

intelligent one." (*Patterson v. Illinois* (1988) 487 U.S. 285, 296 [101 L.Ed.2d 261], fn. omitted.)

If the suspect has invoked his right to counsel, he is not subject to further interrogation by the police until counsel has been made available to him, unless the suspect personally "initiates further communication, exchanges, or conversations" with the authorities. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [68 L.Ed.2d 378]; *People v. Cunningham* (2001) 25 Cal.4th 926, 992.) An accused initiates further communication "when he speaks words or engages in conduct that can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'" (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) In the event he initiates such further communication, "the police may commence interrogation if he validly waives his [*Miranda*] rights." (*Id.* at p. 649.)

Here, defendant was arraigned and a deputy public defender was appointed for him on January 22, 2001. Thereafter, it was defendant who initiated all contacts with the detectives. On each occasion (as reflected in our recitation of each specific interview), defendant initiated the contact, the detectives repeated the *Miranda* advisements, and defendant chose to speak.

Defendant reiterates his argument that the detectives violated his rights because they were aware he had ongoing mental problems that would undermine his exercise of free will to waive his right to have counsel present during interviews in which he incriminated himself. As we have explained, this argument is without merit.

Defendant claims, with no citation to any evidence in the record, that he waived counsel under his continuing belief that he needed to help the detectives solve the case in order to protect George. He says he spoke to the officers without counsel because of his conversion to God (which he suggests the detectives exploited by praising him for doing "the right thing"). The latter circumstance is not grounds for reversal, and the former point is undercut by defendant's own statements reflecting he found confession good for his soul. Defendant's view that the detectives took advantage of his religious conversion is not supported by the record.

Defendant argues this case is similar to *Michigan v. Harvey* (1990) 494 U.S. 344 [108 L.Ed.2d 293], where the officer told the defendant he did not need to speak to an attorney because the attorney would receive a copy of his statement. Here, however, it was defendant who made it clear that he had conferred with counsel, knew her position, and had no use for her because she would not honor his wishes.

We conclude the admission of defendant's custodial statements did not violate his right to counsel.

Having determined there was no *Miranda, supra,* 384 U.S. 436, or Sixth Amendment violation, we find no basis for reversal.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

I concur:

RAYE, J.

Morrison, J.

I concur, but write separately to distinguish between the coercive force of a blunt threat to arrest or confine a relative or close friend from the use of a "ruse" as was the case here.

Detectives Bayles and Stomsvik knew from a wiretapped conversation that defendant hit and stabbed Ricky McAuliffe with a 40-ounce beer bottle that his friend George Wittington had left at defendant's house.

During an in custody interview the detectives told defendant they were going to arrest George for the murder of McAuliffe. Defendant acted incredulous, then Detective Stomsvik said, "we're trying to think of a reasonable explanation why [George's] DNA or fingerprints would be at the scene there . . . ."

The interrogation continued:

"[Detective Bayles]: You have any idea at all?

"[Defendant]: Damn.

"[Detective Bayles]: What? Something tells me you got an idea.

"[Defendant]: Um, yeah.

"[Detective Bayles]: Well, what's the idea? We're all ears.

"[Defendant]: Like the idea is I'm going to solve this case for you right now. [¶]. . . [¶]

"[Detective Bayles]: We're all cool. Good. We're all ears.

"[Defendant]: And I'm going to save you guys a lot of pain and, you know, woo-woo-woo. [¶] . . . [¶]

"[Detective Stomsvik]: Okay.

"[Defendant]: I'm going to tell -- I'm going to solve this whole case for you right now.

"[Detective Bayles]: Okay.

"[Detective Stomsvik]: Okay.

"[Defendant]: I did it."

The defendant then told the detectives the details of the murder of Ricky McAuliffe.

This interrogation and the detectives' ploy was not about coercion, it was about prodding a guilty conscience. He was not induced to confess in a manner that was unfair, that shocks our conscience or that would cause an innocent man to confess to a crime he did not commit. This was a clever, if disingenuous, appeal to honor and responsibility, not an act of intimidation. His will was not overborne, his conscience was pricked. This is a distinction worth making and maintaining, for even with a close relative or good friend, a police ruse that appeals to conscience more than to fear does not produce an involuntary confession. That defendant responded to an appeal to conscience is to his credit, but his confession should not be suppressed.

MORRISON

_____ , J.